



<b><u>Decision Ref:</u></b>	2019-0275
<b><u>Sector:</u></b>	Banking
<b><u>Product / Service:</u></b>	Lending
<b><u>Conduct(s) complained of:</u></b>	Application of interest rate
<b><u>Outcome:</u></b>	Rejected

**LEGALLY BINDING DECISION  
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

**Background**

This complaint concerns the Complainants' mortgage loan account held with the Provider.

**The Complainants' Case**

The Complainants submit that at a meeting with the Provider's Regional Business Manager and Branch Manager in January 2012 they were informed that one part of their mortgage loan would revert to the contracted Prime Rate when the Provider's position improved. The Complainants submit that in November 2014 when they requested the Provider to put the mortgage loan back on the contracted Prime Rate, it refused to do so.

The Complainants submit that they again issued the Provider a letter on 16 January 2015 "*expressing our displeasure at the move from our contracted Prime Rate to the 'BCOF' rate which we were led to believe by [the Provider's Regional Business Manager and Branch Manager] was a temporary move. [The Provider] replied once again refusing our request to put us back onto the contracted Prime Rate*". The Complainants submit that they wrote to the Provider for a third time on 9 February 2015, and it responded on 27 February 2015 with the same outcome.

In relation to the meeting in January 2012, the Complainants state that "*In this short 50 minute meeting, two senior representatives of the [Provider], have both clearly stated that due to the economic conditions at the time in 2011, the bank had to change the reference*

*[it] calculated [its] interest rate on, as [it] and other banks, could not obtain funds on the open market. But both [the Provider's representatives] state that in time, when conditions improved, they would revert back to our original agreed contracted interest rate (tracking 3 month Euribor)".*

The Complainants go on to state that *"The Bank now claim[s] that the portion of our loan which is now linked to BCOF (not Euribor) is permanent and that [it] never led us to believe it was a temporary emergency measure".*

The Complainants are seeking for the Provider to change the interest rate on their mortgage loan account back to the Prime Rate as originally contracted, and for this to be backdated to when the Provider returned to profitability.

### **The Provider's Case**

The Provider submits that its records show that a mortgage loan in the amount of €1,300,000.00 was drawn down on 28 May 2008. The Provider submits that the loan is a Pension Backed Commercial Loan with a term of 276 months. It submits that the signed Offer Letter defines the interest rate applicable as a fixed money market rate, calculated by the following:

- "(a) The Banks Cost of Funds for the selected period. The actual rate will be determined with reference to the market on the date of drawdown. If EURIBOR is utilised the actual rate will be determined with reference to the market two days prior to drawdown*
- (b) Cost of liquidity (if applicable)*
- (c) The Banks fixed margin of 1.1% per annum. Any break costs incurred in amending a fixed rate will be borne by the borrower. While the actual rate will be determined at date of drawdown, indicative all-inclusive rates for a number of fixed interest periods are as follows:- 1 month: 5.54%, 3 years: 5.47%, 5 years: 5.59%"*

The Provider submits that with effect from 16 November 2011 it changed the method of calculating the interest rate on the Complainants' mortgage loan account from the Euribor/Euro Interbank derived reference rates to a reference rate based on Bank Cost of Funds (BCOF). It submits that a letter was issued to the Complainants on 11 October 2011 detailing the changes in the interest rate, which included the following paragraphs:

*"Since 2007, [the Provider] has experienced a significant increase in its funding costs, driven by prevailing market conditions which are outside of our control. During this time, the Bank has been paying a premium over publicly quoted interest reference rates to fund its lending to customers. In an effort to recoup some of these higher input funding costs, with effect from 16 November 2011, [the Provider] is changing the method of calculating its interest rate on your term lending facility(s)*

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*from the current Euribor/Euro Interbank derived reference rates to a reference rate based on Bank Cost of Funds ("BCOF").*

...

*Based on the Bank's funding costs, it is anticipated that the change from your current reference rate to the BCOF will add a premium of approximately 0.7% to the interest rate on your facility. This rate will change in line with the movement in the Bank's overall cost of funding."*

The Provider submits that this amendment to the pricing structure is already provided for within the existing terms and conditions of the Complainants' Offer Letter, which provides that it can change the method of calculating interest or the interest rate to reflect prevailing market conventions or otherwise. The Provider states that *"your acceptance of this change was not sought or required as your signing of the Offer letter, dated 14 April 2008, signified your acceptance of such a potential future interest rate change"*.

The Provider states, *"I understand that you feel [the Provider's Regional Business Manager and Branch Manager] led you to believe that the change in calculating interest, that is the move from Euribor to BCOF, was a temporary measure. Please be advised that [the Provider's Branch Manager] is no longer employed by the Bank so I am not in a position to obtain a statement from him regarding this meeting. I have raised this matter with [the Provider's Regional Business Manager] who has advised me that he did comment that the Bank [does] want to get to an improved cost of funding and that he believed this was something that would take time. However, [he] has also confirmed that despite outlining the Banks above intentions, neither he nor [the Provider's Branch Manager] gave any assurances as to how long it may take for funding to become normalised nor did they advise you that the Bank would return to using Euribor at any future point"*.

The Provider submits, in its final response letter to the Complainants, that the Euribor is no longer a functional reference rate for the current cost of funds to the Bank and its move to BCOF *"reflects the current market conditions and cost of funding to the Bank"*.

### **The Complaint for Adjudication**

The issue to be determined is whether the Provider has incorrectly and/or unreasonably failed to return one part of the Complainants' mortgage loan account to the contracted Prime Rate.

### **Decision**

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The Complainants were given the opportunity to see the Provider's

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response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

In arriving at my Legally Binding Decision I have carefully considered the evidence and submissions put forward by the parties to the complaint.

Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence furnished did not disclose a conflict of fact such as would require the holding of an Oral Hearing to resolve any such conflict. I am also satisfied that the submissions and evidence furnished were sufficient to enable a Legally Binding Decision to be made in this complaint without the necessity for holding an Oral Hearing.

A Preliminary Decision was issued to the parties on **28 May 2019**, outlining the preliminary determination of this office in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

On 12 July, the Complainants made a further submission which was exchanged with the Provider. The Provider did not make a further submission.

Following the consideration of all of the evidence and submissions, including the additional submission from the Complainants, my final determination is set out below.

The Complainants submit that the Provider agreed that the Prime Rate is indeed *“a very nice rate”*, as is stated in an email from one of the Provider’s representatives to the Provider’s Regional Manager dated 1 September 2010. The Complainants state that the Provider *“obviously [does] not want us to avail of this rate, even though it is the rate on our Offer Letter”*.

The Complainants submit that the Provider’s position in 2011 when it changed the way it calculated the interest rate on the loan was driven by prevailing market conditions. The Complainants state that *“We were not given any choice over whether or not to accept this change that was imposed upon us. It was unilaterally applied regardless of our attempts to resist it. The conditions under which [the Provider was] operating in 2011 and under which [it] saw fit to introduce the change in interest rate, have drastically improved now. The conditions under which this change was introduced were emergency conditions and these no longer exist for [the Provider]”*.

The Complainants have drawn attention to the Provider’s reported profits in 2014 and the fact that it gave its staff pay rises in 2016 and 2017. They state, *“We think this is a sure indication that the bank’s position has improved dramatically. We think the bank are profiteering on the backs of hard-working people, like ourselves”*.

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The Complainants submit that during a meeting with the Provider's Regional Business Manager and Branch Manager in January 2012 they were given assurances about the interest rate applicable to a portion of their mortgage loan, however the Provider has refused to adhere to these assurances. The Complainants submit that they recorded this meeting, and during the meeting, the Provider's Regional Business Manager states:

*"that eventually the bank will get back to tracking the 3 month Euribor, that's the bank cost of funds".*

The Complainants state that:

*"Once again later in the same meeting we asked directly, that in time when market conditions improved, would the Bank revert our loan back to the original interest rate tracking 3 month Euribor, [the Provider's Branch Manager] states that we would:*

*"when the bank gets back to normal funding conditions, he could see no reason why we can't get back to doing what we were doing".*

The Provider submits that its Branch Manager is no longer employed by it, and it is not in a position to contact him regarding the matter. The Provider has submitted a copy statement from its then Regional Business Manager, which I note states, among other things, the following:

*"In my then role as Regional Business Manager... my responsibility oversaw the changes in the cost of funding. I met many clients with regard to communicating these changes and in that time I did not overpromise or miscommunicate the challenging changes we were making in our funding costs, in order to become a viable pillar Bank.*

*I refute completely the points being made by the complainants in the meeting in January 2012. They correctly state that the meeting was called to 'draw a line in the sand' as it was called to get the relationship back onto a better footing. Note the meeting was called by [the Provider] in good faith and the purpose was not to move them to the new rate as this was a 'fait accompli' at that stage. I was not aware that the meeting was being recorded and indeed would not have progressed the meeting had I known, given legal representation was not present. The complainants' reference to the 'meeting being openly recorded' is incorrect and is manufactured. I have not heard the recording at the time of writing this submission but I am certain I did not give authority to have the meeting recorded and that it will not be heard on the recording. I also am confident that I did not commit that [the Provider] would revert back to using the original contracted rate.*

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*There is a reference by the complainants that we should refer to our minutes of the meeting. There was no reference in the meeting to minutes being taken, nor were there minutes taken as again [the] purpose of meeting was to find a way forward, it was not a formal business meeting.*

*I have read many references to the complainants stating they were led to believe that the move to BCOF was a temporary move, that they were given assurances that when the Bank's position improved, the original contracted rate would be reinstated to their loan. Note again I refute that this was said in the meeting. The contract is the offer letter and [the Provider] did not and has not breached the contract. I do remember discussing the cost of funding and that it was in everyone's interest that funding would return to normality, given the difficulties at that time, both for the Bank and our customers as borrowers and deposit holder. I could not and did not give any certainty around a timeline as it was not in my knowledge or remit to do so and again refute the complainant maintaining we confirmed it was a 'temporary emergency measure'. I also do not recall [the Provider's Branch Manager] making any commitments to the complainants as they maintain he did."*

In response to the Provider's representative's statement, the Complainants state the following:

*"1) [The Provider's Regional Business Manager] did not meet with us to communicate the interest rate changes in October 2011. We merely received notification of this drastic change in a letter by ordinary post.*

*2) [The Provider's Branch Manager] had been informed before the meeting that the meeting would be recorded. We had not met nor heard of [The Provider's Regional Business Manager] at that time. [The Provider's Branch Manager] was our point of contact then. [The Provider's Branch Manager] was very anxious for the meeting to take place. We reject [the Provider's Regional Business Manager's] accusation that we have manufactured statements regarding the recording of the meeting. He is, in fact, calling us liars...*

*3) We note [the Provider's Regional Business Manager] did not regard the meeting as a formal meeting. The meeting in question took place on a normal business day (Monday) at 9am at [the Provider's] offices in [named location]. It was not a casual meeting over a cup of coffee or lunch. It was in fact, a very formal, structured business meeting where the bank had a set agenda to discuss and a number of items to implement, as follows:*

- Insurance Matters*
- Cost of Funds*
- Direct Debit Mandate/Standing Order*

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- *Appointment of a Relationship Manager*

*It seems [the Provider's Regional Business Manager] wishes to minimise the importance of this meeting by stating that there were no minutes taken. Perhaps it is fortuitous that we both minuted and recorded the meeting as [the Provider's Regional Business Manager's] recollections are vague and inaccurate to say the least. If [the Provider's Regional Business Manager] had taken the time to listen to the recording, perhaps his memory of the meeting would be clearer..."*

The Complainants submit that the Provider's representative in his statement declared that he had not listened to the recording of the meeting. The Complainants state that *"This fact, in addition to the delay in [the Provider's representative's] statement being furnished, tells us that [the Provider does] not treat our complaint seriously and indeed, are contemptuous not only of ourselves but of the entire complaints procedure managed by FSO. We regard this as negligent under the Consumer Protection Code 2012 General Principles 2.1 and 2.2"*.

Provisions 2.1 and 2.2 of the Consumer Protection Code 2012 provide that:

*"A **regulated entity** must ensure that in all its dealings with **customers** and within the context of its authorisation it:*

*2.1 acts honestly, fairly and professionally in the best interests of its **customers** and the integrity of the market;*

*2.2 acts with due skill, care and diligence in the best interests of its **customers**"*

The Provider submits that it does not accept the Complainants' assertion that they were informed by its representatives during a meeting in January 2012 that their loan would revert to the Euribor/Euro Interbank rate when the Provider's position improved. The Provider submits that the meeting was arranged in good faith to rebuild the relationship between it and the Complainants, and not to discuss amending the loan to a new rate as this had taken place in November 2011. The Provider submits that while the cost of funding was discussed during the meeting, at no stage were the Complainants advised that when its position improved, their loan would revert to the Euribor. The Provider states that it *"could not and did not give any certainty around a timeline as it was not in the Bank staff's knowledge or remit to do so"*.

The Provider states that *"regardless of what the Complainants believed after the meeting, the meeting itself would not have caused the Complainants to take a transactional decision that they would not have taken otherwise in relation to interest rates because their loan had already been moved to the Bank Cost of Funds/[the Provider] Business Prime rates in October of 2011"*.

The Complainants have submitted a recording of the meeting with the Provider's representatives in January 2012. It is not evident from the recording whether or not the Complainants informed the Provider's representatives that the meeting would be recorded.

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Having listened to the recording of the meeting, I note that the quotes, as set out by the Complainants above, were not the Provider's representatives' direct quotes. I note that during the meeting between the Complainants and the Provider's representatives in January 2012, the following conversation took place:

Provider *"If we don't fix it... now its fixed we hope that it will come down over time and that eventually again we'll be able to track 3 months Euribor, that's what Bank Cost of Funds is but it will take I don't know how much time in order to do that."*

...

Provider *"I can accept that you're not happy with the cost of funds but that's the reality and [ ] the best explanation we can give you on it and it is isn't going to change, I mean we have taken the decision as a bank that we have to recover our own cost and, em, so I don't know what else we can do [ ] in relation to that. Does it at least explain to you where the bank is coming from..."*

Complainant: *"We appreciate the Bank Cost of funds, we see exactly where it's come from but we also see highlighted in black and white on our loan agreement, where we were paying and which we were sold, we were paying Prime plus a margin... based on a rate that you could easily track independent of the [Provider]... that's the agreement that we signed up to that we got into, now the goal posts have changed, and that's where our annoyance is with the Bank Cost of Funds".*

Complainant: *"If I can get it correct in my mind, the banks... and the bank's accountants would see that down the road it would go back to our original".*

Provider: *"What you have at the moment... is you've a totally dysfunctional market".*

...

Provider: *"Until we get back to normal funding conditions and when we do get back to normal funding conditions, I would see no reason why we wouldn't go back to doing what we were doing all along through the years."*

Provider *"... The [Provider] has deleveraged significantly over the last year so our requirement for deposits to demand... is becoming less and less so hopefully like when that pans out then deposit rates will start coming down again and all that will help the Bank Cost of Funds..."*

While I note that in this conversation the Provider's representatives indicated that the interest rate could go back to tracking 3 month Euribor, I do not accept that the Provider's

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representatives advised the Complainants that the interest rate on their mortgage loan account would definitely revert to tracking the 3 month Euribor.

In their Post Preliminary Decision Submission of **12 July 2019**, the Complainants state in relation to my Preliminary Decision:

*“You state that the Bank’s representatives indicated that the interest rate could go back to tracking 3 month Euribor but you do not accept that they told us that the interest rate would definitely revert to tracking the 3 month Euribor.*

*As two ordinary bank customers at a meeting with two senior bank officials, one a Regional business manager and the other a Branch manager, we were definitely led to believe that at some stage in the future, our mortgage would revert back to tracking Euribor.*

*We believe that your interpretation of this part of the meeting heard on the recording is an error of fact and had you actually been present at that meeting with us, there is no doubt in our minds whatsoever, that you would agree the inference from both bank officials was that the rate would revert to tracking the 3 month Euribor, they just stopped short of saying the actual words and yet it is quite obvious to us from the documents provided to your office in replying to this complaint, that the bank never had any intention of reverting our loan back to tracking the three month Euribor – the “gentlemen” from the Bank misled us.”*

Having considered what was actually said at the meeting, as recorded by the Complainants, I cannot accept the Complainants’ interpretation. Indeed, I note the Complainants’ themselves state that the *“gentleman from the bank...” “just stopped short of saying the actual words”*.

In that regard, I note that Condition 5 of the Offer Letter sets out, among other things, the following:

*“5. Interest*

*(i) [Provider] Rates:*

*The rate(s) set out in this Offer Letter, whether fixed or variable will be determined by the Bank by reference to the Borrower’s category, term, purpose and security proposed for the facility. Fixed rates are rates fixed for a period in excess of one year, determined on the date of original drawdown.*

*- Variable*

*On a rate change occurring in the [Provider] Variable Rates, (whether Prime or otherwise), the new rate will automatically apply to the facility as and from the date of such change and the Bank will give details thereof to the Borrower in the statement which issues following such rate changes.*

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*(ii) Market Related Rates*

*These are Market Related Rates and are fixed for periods not exceeding 12 months. The Market Related Rate(s) set out in this Offer Letter will be determined by the Bank, with reference to three components:*

*(1a) Cost of Funds*

*The rate determined by the Bank on the date of drawdown and calculated by reference to the rate at which the Bank can borrow money on the Euro Interbank Market, for a period corresponding to the relevant interest rate period. The interest rate will be set on the date of drawdown and shall be reset on the first day of each interest rate period.*

*OR*

*(1b) EURIBOR*

*The rate determined by the Bank, two rate Fixing Days prior to drawdown and calculated by reference to the rate at which Euro Interbank term deposits, (quoted for spot value on an adjusted 365 day count basis, for a period corresponding to the relevant interest rate period) are being offered within the EMU zone, by one prime bank to another at 11.00 a.m. (Brussels time).*

*Euribor will be quoted to the Bank on a 360 day count basis, adjusted to a 365 day count to take account of existing market practice in Ireland. The amount of interest will vary only to the extent of differences attributable to rounding, when the rate is adjusted from 360 to 365 days.*

*...*

*(2) Liquidity Costs/Reserve Asset Cost*

*Such additional percentage rate as the Bank shall determine to be necessary to compensate the Bank, for the cost to the Bank, during the period of the facility, of funding or maintaining a facility in the relevant amount, by reason of the Reserve Asset Requirement relative to such period...*

*(3) Bank Lending Margin*

*The margin is as stated earlier in this Offer Letter....*

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***Change in the Method of Calculation of Interest and for all facilities set out in this Offer Letter***

*The method for calculating interest and the interest rate may be changed in respect of all facilities from time to time at the Banks absolute discretion, whether to take account of a change in prevailing market conventions in Ireland or otherwise. In the event of such change occurring during the continuance of this facility, the Bank will give the Borrower one month's prior notice that such change is to take place with effect from the date of expiry of such notice."*

The Provider submits that the first page of the Offer Letter states that the actual rate will be determined on subsequent roll over dates and as set out in Clause 5 of the standard terms and conditions. The Provider states that *"therefore the front page of the offer letter specifically drew the Complainants' attention to the fact that interest rates would be determined in accordance with clause 5 of the standard terms and conditions. Thus the offer letter clearly drew the Complainants' attention to the fact that the interest rate indicated in the offer letter will be subject to the Bank's right to change the calculation method. Therefore this fact was brought to the Complainants' attention prior to their acceptance of the facility"*. The Provider goes on to state that *"If the Complainants did not agree with the terms of section 5 they were free to reject the facility letter presented to them for signature. The fact that they did not reject the facility and instead freely signed the documents means that they agreed to enter into the relevant loan commitments which included giving the Bank [the] right to change the interest rate calculation method"*.

I note that pages 1 and 2 of the Offer Letter set out, among other things, the following:

*"Interest Rate*

*The rate(s) set out in this Offer Letter are indicative only in respect of the new facilities detailed and are subject to change between the date of this Offer Letter and the actual drawdown of the facility. The actual rate will be determined on drawdown and subsequent roll-over dates (if applicable) and as set out in Clause 5 of the standard Terms and Conditions set out in the Appendix hereto.*

*1. The Interest Rate applicable is a fixed money market rate. Money market rates are calculated by totalling the following:-*

*(A)*

*The Bank's Cost of Funds for the selected period. The actual rate will be determined with reference to the market on the date of drawdown. If EURIBOR is utilised the actual rate will be determined with reference to the market two days prior to drawdown.*

*(B)*

*Cost of Liquidity (if applicable)*

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(C)

*The Bank's Fixed Margin of 1.1% per annum. Any break costs incurred in amending a fixed rate will be borne by the borrower. While the actual rate will be determined at date of drawdown, indicative all-inclusive rates for a number of fixed interest periods are as follows:-*

*1 Month: 5.54%      3 Years: 5.47%      5 Years: 5.59%*

*A Variable Interest Rate option is also available which is based on the Bank's Prime rate plus a margin of 0.6% per annum currently totalling 5.41% per annum. The [Provider's] Prime Rate is a rate primarily determined by reference to the Euro Inter Bank Offered Rate (EURIBOR) utilising the average of the 1 month EURIBOR over the working days of the preceding week.*

*Terms of Facilities and Repayment*

*Exact repayments will be determined on date of drawdown based on the interest rate then prevailing.*

- 1. Pension Backed Commercial Mortgage is repayable in full within 276 months of drawdown. Interest in the amount of €5,860.83, shall be payable monthly in arrears, commencing one month from drawdown. Capital to be repaid in full (€1,300,000) from proceeds of pension policy or from other sources. The interest only payment figure is quoted for information purposes only and is based on the Variable interest rate quoted above. The actual payment figure will be determined on the date of drawdown by reference to the interest rate then applying for the selected period."*

The Provider submits that the effect of Condition 5 of the Offer Letter is to give it an overriding discretionary power to alter the provisions of the loan in respect of interest rates or the manner in which interest rates are calculated. The Provider states that *"in accepting clause 5 the Complainants must have understood that for example in the event of it being wholly uneconomic to maintain the lending for whatever reason (including a massive divergence between the cost of borrowing to the Bank and ERUIBOR) that the Bank could, provided it gave one month's notice, vary the interest rate provided for under the agreement or vary the method of calculation of the interest rate at the Bank's sole discretion"*.

I note that the Provider's letter to the Complainants dated 11 October 2011 states:

*"I refer to your existing facility with [the Provider] as detailed above.*

*Since 2007, [the Provider] has experienced a significant increase in its funding costs, driven by prevailing market conditions which are outside of our control. During this time, the Bank has been paying a premium over publicly quoted interest reference rates to fund its lending to customers.*

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*In an effort to recoup some of these higher input funding costs, with effect from 16<sup>th</sup> November 2011, [the Provider] is changing the method of calculating its interest rate on your term lending facility(s) from the current Euribor / Euro Interbank derived reference rates to a reference rate based on Bank Cost of Funds ("BCOF").*

*The BCOF will be calculated on a daily basis and will represent the cost to the Bank of funding in the domestic and international market from consumer, business and institutional sources. The BCOF will be available to customers through our Branch Network and Relationship Managers.*

*This amendment to our pricing structure is already provided for within the existing terms and conditions of your facility letter and thus there is no requirement for you to sign any additional loan documentation.*

*The Bank will introduce the BCOF reference rate following the expiry of the contractual one month's notice period from the date of this letter. As a result the BCOF will be applied at the next interest rate rollover date on your facility on or after the 16<sup>th</sup> November 2011. In the case of Prime Rate term loan borrowers the new rate will apply on the 16<sup>th</sup> November 2011.*

*Based on the Bank's funding costs, it is anticipated that the change from your current reference rate to the BCOF will add a premium of approximately 0.7% to the interest rate on your facility. This rate will change in line with the movement in the Bank's overall cost of funding.*

*We do appreciate that this increase in interest costs may be difficult for some customers to absorb. Should you have concerns in this regard your Relationship Manager will endeavour to assist you with managing the impact of this change and look at potential solutions for your business including that of maintaining your repayments at their current level and extending the term of your loan.*

*We very much regret the need to pass on this increase, however the Bank's continued absorption of these increased funding costs is no longer sustainable.*

...

*This advice letter should be read in conjunction with the attached appendix. Please do not hesitate to contact your Relationship Manager if you have any further queries."*

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I note that the appendix attached to the Provider's letter dated 11 October 2011 sets out, among other things, the following:

**"Appendix 1**

**1. Change in the method of the calculation of Interest and Interest Rate**

*In accordance with the clause in the Terms and Conditions of your accepted offer letter headed "Change in the Method of Calculation of Interest for all facilities set out in this Offer Letter" [the Provider] can change the method of calculating interest or the interest rate to reflect prevailing market conventions or otherwise. Accordingly the method of calculation of your interest and the interest rate are being changed in the manner described below:-*

- ***In respect of Euribor based loans***

*If your facility is calculated according to Euribor it will in future be calculated according to the Bank Cost of Funds Rate ("BCOF"). The definition of the BCOF Rate is explained below. The current reference to Euribor in your facility letter will no longer be applicable.*

- ***In respect of Cost of Funds based loans***

*We are changing the existing method of calculation of Cost of Funds as outlined in the facility letter. The current definition of Cost of Funds in your facility letter will no longer be applicable and will be replaced by the following definition:-*

- *Bank Cost of Funds means the rate determined by the Bank on the date of drawdown or interest rate rollover and calculated by reference to the cost of the Bank of funding the Loan(s) or facilities from whatever sources it may reasonably select. The interest rate will be set on the date of drawdown and shall be reset on the first day of each interest rate period.\**

- ***In respect of [the Provider] Prime Rate***

*The new [Provider] Business Prime Rate definition will replace the current definition of [the Provider] Prime Rate in your facility letter(s) in respect of term facilities as follows:*

- *[The Provider] Business Prime Rate means the rate determined by the Bank and calculated by reference to (i) the cost to the Bank of funding the Loan(s) or facilities from whatever sources it may reasonably select*

*and (ii) such other funding rates or factors as the Bank may deem appropriate in its absolute discretion from time to time.\**

...

*\*Incorporates an appropriate loan margin"*

In relation to the Provider's statement in its letter dated 11 October 2011 that "Based on the Bank's funding costs, it is anticipated that the change from your current reference rate to the BCOF will add a premium of approximately 0.7% to the interest rate on your facility", the Complainants state that "This is not the case. The rate we are currently paying on one half of our loan (original contracted Prime Rate Loan) is 0.94% and the rate we are currently paying on the other half of our loan (BCOF Rate Loan) is 2.64%. There is a difference of 1.69% between these two rates which is quite considerable; 1% in fact over and above what the bank advised us it would be in 2011".

I note that the Complainants raised this issue with the Provider during the meeting in January 2012. I note that at this time the second Complainant pointed out that the Provider, in its letter dated 11 October 2011, set out that the change from the then current reference rate to the BCOF will add a premium of approximately 0.7% to the interest rate on their facility, however there is a difference of 1.3%, a difference of approximately 50%. The second Complainant stated that "It hasn't gone up by .7 with us... it's gone up considerably more than .7... I know the .7 is an average but, you know".

In response, the Provider's representative stated that "at the time when... back in October when the letters went out that that was the cost at the time, and that will go up and down on a monthly basis". The second Complainant then stated "Ok, ok".

While I note that there has been a significantly higher premium added to the interest rate on the Complainants' mortgage loan, I must accept that the Provider did set out in its letter to the Complainants dated 11 October 2011 that "approximately" 0.7% was the "anticipated" change, and also highlighted that "This rate will change in line with the movement in the Bank's overall cost of funding".

The Complainants, in their submission to this office dated 31 March 2017, submit that the Provider has not addressed anomalies raised by them in its assertion that tracking the 3 Month Euribor is no longer a functioning rate. The Complainants state that "However the Irish Central Bank and all the main European Banks including [the Provider] state that the Euribor is the rate at which Euro Interbank Term Deposits are offered by one prime bank to another". The Complainants attached to their submission a copy of the Central Bank of Ireland's report on then Current Euribor Rates, and also a suite of products sold by the Provider Global Markets Division in 2014, "three years after we were informed the Euribor is no longer a reference rate, clearly selling tracker-based products using the Euribor as [its] reference rate". The Complainants go on to state that "Therefore we assert our view that the bank's claim that the 3 month Euribor is no longer a functioning rate, is completely untrue and cannot be used as a valid reason to refuse us our original contracted rate of Prime +0.6%".

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In response, the Provider submits that it has reviewed its correspondence to the Complainants and does not see any assertion made by it that the Prime Rate is no longer a functioning reference rate. The Provider submits that in relation to the Prime Rate applicable to the Complainants' mortgage loan, its letter to the Complainants of 11 October 2011 states under the heading "*in respect of [the Provider] Prime Rate*" that:

*"The new [Provider] Business Prime rate definition will replace the current definition of [the Provider] Prime rate in your facility letter in respect of term loan facilities as follows:*

*"[The Provider] Business Prime Rate means the rate determined by the bank and calculated by reference to (i) the cost to the Bank of funding the Loan(s) or facilities from whatever sources it may reasonably select and (ii) such other funding rates or factors as the Bank may deem appropriate in its absolute discretion from time to time."*

The Provider submits that Prime Rate does not refer to Euribor. The Provider states that "*The Complainants have no right, contractual or otherwise to an interest rate derived by reference to Euribor*".

The Complainants submit that the Offer letter clearly states under "*Interest Rate*" that:

*"A variable interest rate option is also available which is based on the bank's prime rate plus a margin of 0.6% currently totalling 5.41% per annum. The [Provider] prime rate is a rate primarily determined by reference to the Euro Inter Bank Offered Rate (Euribor) utilising the average of the 1 month Euribor over the working days of the preceding week."*

The Complainants state that "*Now the [Provider] claim that the Euribor is not a functional reference rate to the cost of funds. The [Provider] want to decide what parts of the offer letter they want to adhere to and what to dismiss as no longer relevant*".

The Provider submits that the Complainants are quoting from a definition of the rate which no longer applies to the loan. The Provider submits that its letter of 11 October 2011 replaced its Prime Rate with its Business Prime Rate. The Provider states that the Business Prime Rate is defined as "*the rate determined by the Bank and calculated by reference to (i) the cost to the Bank of funding the Loan(s) or facilities from whatever sources it may reasonably select and (ii) such other funding rates or factors as the Bank may deem appropriate in its absolute discretion from time to time*".

The Provider states that:

*"The Complainants quote from the judgment in High Court case Sheehan v Breccia & Ors [2016] IEHC 67 and state that "we fail to see how [the Provider] can maintain their position of it [Euribor + margin] not being a functional rate"*.

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*In their submission on 31 March 2017 they state that “we assert our view that the bank’s claim that the 3 month Euribor is no longer a functioning rate is completely untrue”, and they include a copy of a brochure for an Interest Rate Swap Product offered by [the Provider] Global Markets (undated), which refers to Euribor rates. It is important to note that the Bank has not at any stage asserted that 3 month Euribor is not a functioning rate. This rate is not published or controlled by the Bank. It is published independently on a daily basis and is under the remit of the European Money Markets Institute. The Bank has stated that Euribor was not a functional reference rate for the Cost of Funds interest rate and that the change to Bank Cost of Funds in November 2011... reflected this.”*

Having carefully considered all of the evidence before me, I note that the Provider has not stated that the 3 month Euribor is no longer a functioning rate, but rather that the Euribor was not a functional reference rate for the Bank Cost of Funds interest rate. I note the Provider’s letter dated 11 October 2011 notified the Complainants that the Prime Rate in their facility letter would be replaced with its new Business Prime Rate, defined as “*the rate determined by the Bank and calculated by reference to (i) the cost to the Bank of funding the Loan(s) or facilities from whatever sources it may reasonably select and (ii) such other funding rates or factors as the Bank may deem appropriate in its absolute discretion from time to time*”.

I note that the Complainants, in their Post Preliminary Decision submission of **12 July 2019**, suggest the conditions of the offer letter permitting the Provider to vary the method of calculating the interest rate is in breach of the European Community (Unfair Terms in Consumer Contracts) Regulations 1995. I do not believe this to be the case.

In that Post Preliminary Decision submission the Complainants also suggest that the ‘Contra Proferentem’ rule should be applied. However, this would only come into play if the condition could be considered ambiguous. While I accept the Complainants do not like Condition 5 of the offer letter and its effect, I do not find it to be ambiguous.

I must accept that pursuant to the terms and conditions of the mortgage loan account, the Provider was entitled to change the method of calculating interest at its absolute discretion. This office will not interfere with the commercial discretion of a financial service provider, other than to ensure that the Provider complies with relevant codes/regulations and does not treat the Complainants unfairly or in a manner that is unreasonable, unjust, oppressive or improperly discriminatory. There is no evidence before me to suggest that the Provider treated the Complainants unfairly or acted in any way unreasonably. Furthermore, I have been provided with no evidence that the Provider was discriminating against the Complainants or that its behaviour was oppressive.

I note that the Provider, in its submission to this Office, states that it acknowledged the Complainants’ complaint on day six of receiving the complaint and not within five business days of receiving the complaint as required by provision 10.9(a) of the Consumer Protection Code 2012. The Provider states that it “*apologises for this error and would like to offer the Complainants €500 as [a] gesture of apology*”.

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I am of the view that the sum of €500.00 is sufficient compensation for the Provider's breach of Provision 10.9(a), and on the basis that this offer remains available to the Complainants to accept, it is my Decision that this complaint is not upheld.

### **Conclusion**

My Decision is that this complaint is rejected, pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**.

The above Decision is legally binding on the parties, subject only to an appeal to the High Court not later than 35 days after the date of notification of this Decision.

**GER DEERING  
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

12 August 2019

Pursuant to **Section 62** of the **Financial Services and Pensions Ombudsman Act 2017**, the Financial Services and Pensions Ombudsman will publish legally binding decisions in relation to complaints concerning financial service providers in such a manner that—

- (a) ensures that—
  - (i) a complainant shall not be identified by name, address or otherwise,
  - (ii) a provider shall not be identified by name or address,  
and
- (b) ensures compliance with the Data Protection Regulation and the Data Protection Act 2018.